90-1788

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

GAHLON W. KUNKLE, et al.,

PETITIONERS

v

FULTON COUNTY BOARD OF COMMISSIONERS
et al.,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. SIXTH CIRCUIT COURT OF APPEALS

WILLIAM P. HICKEY
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COUNSEL FOR PETITIONERS

QUESTIONS PRESENTED

1.) Does the Amendment effective December 1, 1980 to 28 USC 1331, now require that all cases involving the Fourteenth Amendment to the United States Constitution be brought in the Federal District Courts?

2.) Can a Federal District Court docket a case involving the constitutionality of a state tax matter, require the tax to be paid, and then give a declaratory judgment on the constitutional questions, without violating 28 USC 1341?

3.) Does 28 USC 1341 prevent a Federal District Court from hearing the regulatory matters in a body of state laws, that also contain one or more tax matters? (i. e. does the doctrine enunciated in Miami Herald v The City of Hallandale 734 F. 2d 666 apply?)

4.) Does the decision in California v Grace Brethren Church, 457 U. S. 393, require that a court first determine that a state has a system which provides for complete recovery of a tax once paid, before the court decides that the state has a "plain, speedy and efficient system" for hearing a tax matter; and before the District Court decides that it can not give a declaratory judgment under 28 USC 1341?

PARTIES TO THE PROCEEDING

Plaintiffs - Petitioners

Gahlon W. Kunkle;

Mrs. Gahlon Kunkle;

Eldin Max Borton;

Randy Merillat;

North West Ohio Rivers Council;

William P. Hickey.

Defendants - Respondents

Fulton County Board of Commissioners;

Sandusky County Commissioners;

Sandusky County Auditor;

Sandusky County Treasurer;

Joseph J. Sommer, Director of
Ohio Department of Natural Resources;

Tax Commissioner, State of Ohio.

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COURT OF APPEALS

The Petitioners, Gahlon W. Kunkle, Mrs. Gahlon Kunkle, Eldin Max Borton, Randy Merillat, North West Ohio Rivers Council, & William P. Hickey respectfully pray that a writ of certiorari issue to review the order and opinion of the U.S. Sixth Circuit Court of Appeals entered on January 8, 1991.

OPINIONS BELOW

The Orders of the U. S. Sixth Circuit Court of Appeals entered January 8, 1991, and February 28, 1991; and the judgments of the District Court are set out in the Appendix hereto. All decisions are unreported.

JURISDICTION

The jurisdiction of the U. S. Supreme Court to review this decision of the U.S. Court of Appeals is conferred by 28 USC Section 1254 (1).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws."

STATUTES INVOLVED

28 USC 1331

> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 USC 1341

"The district courts shall not enjoin, suspend or restrain the asessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Ohio R.C. 2723.05

"If, by judgmentor final order of any court of competent jurisdiction in this state, in any action not pending on appeal it is determined that any tax or assesssment or part thereof was illegal and such collection or payment of such tax or assessment, then at the time of such judgment or order unexpended and in the possession of the officer collecting the same shall be refunded to the person paying such tax or assessment by the officer having the same in his possession."

R.C. 5703.38

"No injunction shall issue suspending or staying any order, determination, or direction of the department of taxation or any action of the treasurer of state or attorney general required by law to be taken in pursuance of any such order, determination, or direction. This section does not affect any right or defense in any action to collect any tax or penalty."

R.C. 6131.01F (partial)

"Providing an outlet for the accelerated runoff from artificial drainage whenever the stream, watercourse, channel, or ditch under improvement is called upon to discharge functions for which it was not designed by nature; it being the legislative intent that uplands that have been removed from their natural state by deforestation, cultivation artifical drainage, urban development, or other manmade causes shall be considered as benefited by an improvement required to dispose of the accelerated flow of water from the uplands."

R.C. 6131.02

"When the board of county commissioners, at a regular or called session, upon the filing of a petition as provided in sections 6131.01 to 6131.64 of the Revised Code, finds that the granting of the petition and the construction of an improvement is necessary for disposal or removal of surplus water, for controlled drainage of any land, for irrigation, for storage of water to regulate stream flow or to prevent the overflow of any land in the county ... the board of county commissioners may locate, construct, reconstruct, straighten, deepen, widen, alter, box, tile, fill, wall, dam, arch, change the course, location, or terminus of, straighten, deepen, remove obstructions from, or widen any ditch, drain,

watercourse, floodway, river, creek, or run, ...".

R.C. 6131.04 (partial)

"Any owner may file a petition with the clerk of the board of county commissioners of the county in which is located a part of the land that is averred to be benefited by the construction of a proposed improvement."

R.C. 6131.25

"Any interested owner may appeal to the court of common pleas from a final order made by the board of county commissioners, as provided in sections 6131.01 to 6131.64, inclusive, of the Revised Code, and may appeal any one or more of the following questions:
(A) Is the improvement necessary?
(B) Will the improvement be conducive to the public welfare?
(C) Is the cost of the improvement greater than the benefits conferred?
(D) Is the route, termini, or the mode of construction the best to accomplish the purpose of the improvement?
(E) Are the assessments levied according to benefits?
(F) Is the award for compensation or damages just?...".

STATEMENT OF THE CASE

After the plaintiff's taxes jumped 300% he investigated as to why. He found he had not signed a contract with the State relative to farm land and paid a fee as required by the regulations under the CAUV (Current Agricultural Use Value) statutes. He also found that he was specially assessed for a ditch project on a natural stream that lies from 2 miles to 6 miles away from the assessed property; and another ditch project lying from 6 to 10 miles away from the property.

Fluid flow formulas prove that any benefit to a ditch deepening project is confined to approximately 1000 feet to either side of the project. In the last 1000 feet, the water flowing in the ditch speeds up, the surface rounds off and finally pours into the deepened

channel, like water flowing out of a bucket. Under the ditch laws, the state arbitrarily claimed a benefit to every one in the water shed (over 10 miles distant) and was specially assessing properties accordingly.

A case 85 CV 456 was filed in Sandusky Common Pleas Court claiming that the CAUV regulations and statutes were unconstitutional. Another case 85 CV 689 was filed claiming that the Ohio Ditch Statutes were unconstitutional under the Fourteenth Amendment. In both cases the judges (different judges) held that the unconstitutional issues were "not well taken". Investigation indicated that the state courts would not hear a constitutional issue because of 28 USC 1331 which states: "The district courts shall have original jurisdiction of all civil actions

arising under the Constitution ... of the United States."

Plaintiff filed a case in Federal District Court charging that both the CAUV Statutes (R.C. 5713.30 through 5713.38) and the Ohio Ditch Statutes (RC 6131 through RC 6141) were unconstitutional. The Ohio Attorney General convinced the District Court that both the Ditch Statutes and the CAUV statutes were tax statutes in toto, and that under 28 USC 1341 the District Court could not hear any issues, (tax or regulatory), under either set of statutes. Plaintiff cited the case of Miami Herald vs The City of Hallandale 734 F. 2d 666 werein a single ordinance was declared to be part tax and part regulatory and in which the court heard the regulatory matter. The district court ignored the Miami Herald Case -

even though plaintiff had cited 25 matters that were unconstitutional about the Ditch Statutes, with only approximately 6 statutes involving a tax issue; as well as a number of CAUV issues that did not involve taxes per se.

Plaintiff argued that there were good reasons why 28 USC 1331 precluded concurrent jurisdiction including: 1.) of the express language of the statute; 2.) the clear mandatory language of the legislative history of the 1980 amendment; and 3.) clear and compelling reasons why federal constitutional issues should be heard by a federal court. Plaintiff also argued that in California vs Grace Brethren Church, 457 U.S. 393, the case was filed and briefed before the 1980 amendment; and therefore the case never spoke to the

issue of how the 1980 amendment changed the then prevailing law.

Plaintiff also argued that in California vs Grace Brethren Church, the first thing the Supreme Court did was to determine that California had amended its Constitution, had passed enabling statutes, and instituted regulations, to provide a procedure insuring a complete recovery of a tax once paid and later determined to be invalid. Ohio has done none of these things. As a matter of fact Ohio has a statute RC 2723.05 which effectively prevents the tax, once paid, from being recovered from the State.

The district court ignored all of plaintiff's arguments and held lack of jurisdiction under 28 USC 1341 - stating that the 1980 amendment to 28 USC 1331 expanded federal court jurisdiction but did not do away with concurrent

jurisdiction - citing: Section 3561.1 of Federal Practice & Procedure by Wright, Miller & Cooper; and Chivas Products Lts. v. Owen. 864 F. 2d 1280. Section 3561.1 of Wright, Miller & Cooper says no such thing; and Chivas Products v Owen is absolutely silent as to 28 USC 1331. The reasoning in the Chivas case would support just the opposite to the district court's holding. Not even a first year law student would cite these two references as authority for concurrent jurisdiction. The district court did not want its decision published.

The Sixth Circuit Court of Appeals affirmed the district court's decision using the same reasoning. In addition, it assumed that plaintiff's ditch case only involved RC 6131.25 (a single issue); that the assessments to help

farmers finance private ditches was a tax; that RC 5703.38 permitted a suit to enjoin a county official, citing Torbet v Kilgore 6 Ohio St. 42, - so that plaintiff had equitable relief. Torbet v Kilgore stands for just the opposite. It holds that a suit against a County Treasurer is in effect a suit against the State Department of Taxation, because the State Department of Taxation issues the instructions on what the counties must do.

The Court of Appeals specifically refused to rule on RC 2723.05 because of its (erroneous) holding on RC 5703.38; and then stamped its decision "NOT FOR PUBLICATION"

DISCUSSION

There is no reason that the literal meaning of 28 USC 1331 can not be dovetailed with the literal meaning of 28 USC 1341.

This can be done by having all cases involving federal constitutional matters filed in the District Courts. Thereafter, the District Court should determine if the collection of a state tax is involved. If it is, the court should next determine if the State has a procedure for obtaining a complete refund of the tax, if it is determined that the tax was invalid. Next, if the State has such a procedure, the court should require the plaintiff to pay the tax and bring the receipt to the court. Thereafter, the federal district court should issue its declaratory judgment, and the plaintiff can use the judgment

to get his tax back. He can also use the judgment for filing an action under 42 USC 1983 to satisfy current case law.

There is no need to cite decisions at this point. Appellant has not found a single case involving the 1980 Amendment to 28 USC 1331. All prior decisions are of little value. Appellant has also examined the annotations under 28 USC 1341 since 1980, and has not found a single case ruling on the effect which the 1980 Amendment to 28 USC 1331 has on 28 USC 1341. The cases cited by the courts below do not support their rulings. On the contrary, they support just the opposite.

If and when plaintiff can find a federal or state court which will hear a constitutional attack on a State Statute that involves a tax, he will there point out that the Ohio CAUV statutes are not

conservation statutes as enabled by Article II, Section 36 of the Ohio Constitution. To make 99.9% of the farmers in Ohio sign a contract, and pay a fee, before his land will be taxed as farm land according to the uniform mode, prevents RC 5713.30 through 5713.38 from being conservation statutes. In reality, only those farmers bordering large cities (0.1% of those covered by the statute) have a conservation problem. <u>What the Ohio Legislature should do</u> is to pass a statute zoning all land presently used for agriculture, as agricultural land. It should then pass a second statute which states that the zoning of agricultural land can not be changed to a higher and better use without the approval of the individual farmer owning the land. That would take care of the problem without making

people sign contracts and pay fees before their land will be properly taxed.

In any event, can any state require a citizen of the U. S. to pay a fee and sign a contract before his property can be taxed according to the uniform mode without violating the Fourteenth Amendment to the U. S. Constitution?)

With respect to the Ditch Statutes - it doesn't make sense to allow a single land owner to petition (R.C.6131.04) to have his overflow area along a river drained; have all land in the watershed of the river specially assessed to pay for it; and then have the Federal Government buy back the land, and put the land back into wet land in order to protect the source of the public's drinking water.

In this regard, Ohio is a delegated

powers state, which means that the Legislature only has those powers which are delegated to it by the Ohio Constitution. At the time of the Magna Carta, the King of England was made to transfer ownership of all natural streams to the people. The creeks and rivers became the public's property for their use as drinking water, etc.; and the King, thereafter as a trustee, had to maintain the streams free of pollution, or change of their natural character. The Ohio Constitution does not transfer ownership from the people to the Ohio Legislature. Therefore the legislature can not delegate power to a single land owner, and two county commissioners to drain all overflow areas, and change the natural character of Ohio's streams, <u>without a vote by the public who owns them</u>. Can this be why

the powers that be do not want a court to rule on the matter?

There are at least 24 other unconstitutional provisions in the ditch laws; but the Ohio Attorney General takes the position that none can be considered by a federal court under 28 USC 1341 because a tax is involved. Neither the District Court below, nor the Sixth Circuit Court of Appeals, would rule upon the effect of the Miami Herald vs. The City of Hallandale decision.

In any event, <u>can a state authorize special assessments on the say so of a single landowner and two commissioners, without approval of a majority of the people to be specially assessed,</u> without violating the Fourteenth Amendment to the U. S. Constitution (particularly where the people own the facility).

The Ohio Attorney General argues that R.C. 6131.25 provides an adequate remedy for an attack on the constitutionality of the Ohio Ditch Laws. This is not the case. None of the published decisions support this position. R.C. 6131.25 specifies that an appeal can be taken on six specific technical matters, and there is no positive assurance that a court would not say that a suit on any other issue was not "well taken" - just as they did in 85 CV 456 and 85 CV 689.

The Court of Appeals took the position that plaintiff's whole case involved the constitutionality of R.C. 6131.25, and then proceeded to knock this straw man down. <u>They cite cases erroneously, and when finished stamp their decision - "NOT FOR PUBLICATION".</u>

The Court of Appeals cites Section 3561.1 of Wright, Miller & Cooper as

authority for their proposition that the amendment of 1980 to 28 USC 1331 enlarged federal jurisdiction, but did not do away with concurrent jurisdiction. Section 3561.1 says no such thing.

They also cite Chivas Products Lts. Owen to support their proposition. Chivas never mentions 28 USC 1331.

The Court of Appeals also cites Torbet v. Kilgore for the proposition that a suit against a county treasurer is not a suit to suspend an order of the department of taxation. Torbet v. Kilgore holds just the opposite. Torbet holds that the counties are instructed on what to do by the State Department of Taxation, and that a suit against the County Treasurer is a ;suit against the State Department of Taxation.

There are other errors committed by

the Sixth Circuit Court of Appeals, and these will be treated in detail in Appellant's Brief, if Certiori is granted.

CONCLUSION

Certiori should be granted to insure that the citizens of the United States have an adequate forum in which to bring an action involving the unconstitutionality of a state tax statute. Presently the State Courts say that such suits are "not well taken" because of 28 USC 1331; and the District Courts say federal courts are forbidden from taking jurisdiction because of 28 USC 1341, and the California vs Grace Brethren Church decision.

William A. Hickey

Certificate of Service

I certify that I am a member of the Bar of this Court representing the Petitioners herein and that three copies of the above petition for writ of certiorari to the Sixth Circuit Court of Appeals were served upon counsel for each of the respondents, by U.S. mail, first class postage prepaid, addressed to the following respectively: Thomas J. O'Connell, Assistant Attorney General, State Office Tower 26th Fl., 30 East Broad Street, Columbus, OH 43266-5414; Ronald Mayle, Sandusky County Courthouse, 100 N. Park Ave., Fremont, OH 43420; and Donald W. Theis, 1515 National Bank Bldg., Toledo, OH 43604; this 18th day of May, 1990.

William A. Hurley

Segmitt

Filed

A-1 Jan 08, 1991

LEONARD GREEN,

Clerk

NOT FOR PUBLICATION

No. 90-3261

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GAHLON W. KUNKLE, et al.

Plaintiffs-Appellants,

v.

FULTON COUNTY BOARD OF
COMMISSIONERS, et al.

Defendants-Appellees.

ON APPEAL FROM THE U. S. DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF OHIO

BEFORE: KRUPANSKY, GUY, SUHRHEINRICH,
Circuit Judges.

PER CURIAM. Plaintiffs appeal the district court's dismissal of their action to have declared unconstitutional various Ohio statutes outlining the procedures to be followed for assessing taxes for county ditch improvements, and for valuing agricultural land for tax assessment purposes. For the reasons

that follow, we AFFIRM.

I.

On February 21, 1989, Fulton County property owners who were assessed a tax for a county ditch improvement known as Project 2036 brought a declaratory judgment action against the Fulton County Board of Commissioners and the Director of the Ohio Department of Natural Resources. The plaintiffs sought to have Ohio Revised Code §§ 6131.25, which establishes the judicial review procedure for affected landowners wishing to challenge a tax assessment for county ditch work, declared unconstitutional as a violation of due process. On April 17, 1989, another property owner brought an action seeking to have Ohio Revised Code §§ 5713.30-5713.38, which allows landowners to request the county auditor to value

real property for tax purposes at the current value such land has for agricultural use, similarly declared unconstitutional. The cases were consolidated in the district court and, on February 28, 1990, the court concluded that it lacked subject matter jurisdiction based on the Tax Injunction Act, 28 U.S.C. § 1341. This appeal followed.

II.

A. Challenge to County Ditch Work Assessment Statutes.

Appellants argue that the judicial review provision of the county ditch work assessment statutes, Ohio Rev. Code Ann. § 6131.25, violates due process of law because it affords no basis for contesting the validity of the county's action in assessing all individuals in a watershed, including those without

drainage problems, for the cost of constructing and maintaining privately owned ditches. R.C. § 6131.25 provides:

> Any affected owner may appeal to the court of common pleas within twenty-one days of the date that any order was issued by the board of county commissioners, as provided in sections 6131.01 to 6131.64 of the Revised Code, and may appeal any one or more of the following questions:
>
> (A) Is the improvement necessary?
>
> (B) Will the improvement be conductive to the public welfare?
>
> (C) Is the cost of the improvement greater than the benefits conferred?
>
> (D) Is the route, termini, or mode of construction the best to accomplish the purpose of the improvement?
>
> (E) Is the award for compensation or damages just?
>
> The appeal may be taken from any order affecting any part of the improvement as well as from an order affecting the entire improvement.

We agree with the district court that appellants' complaint is barred by the Tax Injunction Act, 28 U.S.C. § 1341, which provides:

The district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Tax Injunction Act also prohibits district courts from issuing declaratory judgments holding state tax laws unconstitutional where a plain, speedy and efficient state remedy exists. California v. Grace Brethren Church, 457 U.S. 393,408, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982).[1] The Act applies even in cases in which states taxes are alleged to be unconstitutional. Schneider Transport, Inc. v. Cattanach, 657 F. 2d 128, 131 (7th Cir. 1981), cert. denied, 455 U.S. 909 (1982). To satisfy the "plain, speedy and efficient remedy" requirement of the statute, the remedy "need not necessarily be the best remedy available or even equal to or better than the remedy that might be

available in federal court." 17 C. Wright, A. Miller & E. Cooper, supra, §4237. Instead, a state court remedy is plain, speedy and efficient within the meaning of the Tax Injunction Act if it provides the taxpayer with a "full hearing and judicial determination" at which the taxpayer may raise constitutional objections to the tax. California v. Grace Brethren Church, 457 U.S. at 411 (quoting Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503,514, 101 S. Ct. 1221, 67 L. Ed 2d 464 (1981)).

In this case, it is clear that the county ditch assessment qualifies as a "tax" within the meaning of 28 U.S.C. § 1341. See Lake Lansing Special Assessment Protest Ass'n v. Ingham County Bd. of Comm'rs, 488 F. Supp. 767, 772-73 (W.D. Mich. 1980) (holding that the term "tax" as used in the Tax

Injunction Act includes special assessments levied by municipal corporations). See also 17 C. Wright, A. Miller & E. Cooper, supra, § 4237 and cases cited therein. Furthermore, R.C. § 6131.25 provides appellants a "plain, speedy and efficient remedy" within the meaning of 28 U.S.C. §1341: appellants are free to bring an action under subsection (A) claiming the contested improvement is unnecessary as applied to them; under subsection (B) claiming the improvement would only be conducive to the welfare of private individuals rather than to the public welfare; or under subsection (C) claiming that the cost of the improvement exceeds the benefits conferred upon them because they will not benefit from it at all.

Appellants argue, however, that even if they are able to bring suit under

R.C. § 2723.01[2] to render an injunction against an illegal levy or collection of taxes and assessments is limited by the specific provisions against an injunction set forth in R.C. § 5703.38, which provides: "no injunction shall issue suspending or staying any order, determination, or direction of the department of taxation, or any action of the treasurer of state or attorney general required by law to be taken in pursuance of any such order, determination, or direction. This section does not affect any right or defense in any action to collect any tax or penalty." See Torbet v. Kilgore, 6 Ohio St. 2d 42, 215 N.E.2d 579 (1966); Rocca v. Wilke, 53 Ohio App. 2d 8, 371 N.E.2d 223 (1977). Under R.C. § 5703.38, an injunction cannot "suspend or stay any action of the state Auditor,

state Treasurer, or Attorney General if they are required by law to take such action as a result of any order, determination or direction of the Department of Taxation. Torbet v. Kilgore, 6 Ohio St. 2d at __, 215 N.E.2d at 582.

In this case, the tax assessment levied by a board of county commissioners for the purposes of constructing the ditch project was not an action taken by the State, nor was it an action which resulted from any order of the department of Taxation. Thus, the general power of the common pleas court to hear injunction suits under R.C. § 2723.01 is unaffected by the exception contained in R.C. § 5703.38. Accordingly, appellants have an adequate remedy under R.C. § 2723.01 in the form of a suit for injunctive relief. See

Management & Inv. Co. v. Zmunt, 59 F.ed 663 (6th Cir. 1932) (landowner's unsuccessful constitutional challenge seeking to enjoin collection of special assessments levied by board of county commissioners to pay for construction of sewer improvements); Falor v. Mong, 47 Ohio App. 442, 191 N.E. 445 (1934) (holding that R.C. § 2723.01 provides injunctive relief for board of county commissioners' sewer assessment if there can be no benefit to the particular tract of land assessed). See also In re Morrison Single Cty. Ditch. No. 1330, 20 Ohio St.3d 13, 484 N.E.2d 699 (1985) (affirming judgment in favor of county board of commissioners in landowners' suit claiming ditch assessments were unconstitutionally disproportionate to the benefits conferred). Moreover, the Supreme Court has made clear that the

Tax Injunction Act bars suit even where a state court does not provide injunctive relief to restrain the collection of taxes, but instead relied exclusively on a refund procedure. Grace Brethren Church, 457 U.S. at 417.[3]

B. Challenge to Agricultural Land Tax Valuation Statutes

Secondly, appellants argue that the agricultural land tax valuation statutes, R.C. §§ 5713.30-5713.38, are unconstitutional because all farmers who wish to have their land valued for real property tax purposes at the current value such land has for agricultural use, rather than its true value in money, are required to submit an application and to pay a $25.00 fee to the county treasury. We agree with the

district court's finding that R.C. 5715 et seq., providing for a county board of revision to hear complaints relating to the valuation or assessment of real property, and R.C. § 5717 et seq., providing for appeal from the county board of revision to the board of tax appeals and supreme court, affords appellants a plain, speedy and efficient remedy, and thus that their claim is barred under the Tax Injunction Act.

Accordingly, the district court's dismissal of appellants' action is AFFIRMED.

ISSUED AS MANDATE: March 8, 1991

COST: None

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[1]Appellants contend that Grace Brethren Church is no longer good law because the district court's decision in that case was filed in 1979, before 28 U.S.C. § 1331 was amended in 1980 to broaden federal court jurisdiction by removing the minimum amount in controversy requirement. Appellants conclude that this broadening of federal jurisdiction necessarily

implied a corresponding limitation on state court jurisdiction. The district court properly rejected this argument as utterly devoid of merit. See Chivas Products Lts. v. Owen, 864 F.2d 1280, 1282 (6th Cir. 1988) (presumption of concurrent jurisdiction may be rebutted only in limited circumstances), rev'd on other grounds, 493 U.S. __, 110 S. Ct. 792 (1990); 13B C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure 3561.1 (2d ed. 1984) (amendment to 28 U.S.C. § 1331 did not limit state court concurrent jurisdiction).

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[2] R.C. § 2723.01 provides: "Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected."

---

[3] Appellants alternatively argue that R.C. § 2723.05 precludes a "plain, speedy and efficient remedy" because that statute only provides for refund to the taxpayer of the amount of taxes which are unexpended and in the possession of the collection officer at the time of the judgment or order determining that an assessment was However, in light of the fact that R.C. § 2723.01 clearly affords an adequate remedy, we decline to address this argument.

Stamped
LEONARD GREEN, Clerk
By Valerie Fields
Deputy Clerk

No. 90-3261

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Gahlon W. Kunkle;	)	
	)	
Plaintiff - Appellant	)	
	)	
GAHLON KUNKLE, Mrs.;	)	
ELDIN MAX BORTON;	)	
RANDY MERILLAT: NORTH WEST	)	
OHIO RIVERS COUNCIL	)	
	)	
	)	
Plaintiffs	)	MOTION FOR
	)	RECONSIDERATION,
vs.	)	VACATION, OR
	)	MODIFICATION OF
FULTON COUNTY BOARD OF	)	ORDER
COMMISSIONERS;	)	
JOSEPTH J. SOMMER, Director	)	
of Ohio Department of	)	
Natural Resources	)	
	)	
Defendants - Appellees	)	

On behalf of all plaintiffs, including those of the origninal consolidated case herein, by William P. Hickey their attorney, pursuant to the provisions of Rule 27 (b) of the Federal Rules of Appellate Procedure, moves this court to reconsider, its order entered

on January 8, 1991, and in support thereof show as follows:

1. Plaintiffs never either in brief or oral argument stated that R.C. 6131.25 was unconstitutional. Rather plaintiff's complaint alledges that Chapters 6131 - 6141 are unconstitutional for the 25 reasons given in plaintiff's Reply Memorandum of September 14, 1989 (Appendix pgs. 61 - 63); and more particularly that 6131.01, 6131.02 and 6131.04 deprive plaintiffs of due process of law. With respect to 6131.25 all that was ever said in brief or oral argument was that it is not authority for a constitutional attack on the ditch laws because such attack is not one of the six enumerated statutory questions which are stated as appealable. The court has set up a straw man here and then procedes to

knock it down.

2.) In California v Grace Brethren Church the first subject treated by the U.S. Supreme Court was the question of whether or not California had a procedure for getting back a tax once paid. Only after it is determined that one can get the tax back, does the question of a "plain, speedy and efficient" procedure have any relevance.

Plaintiffs argued in brief and oral argument that R.C. 2723.05 effectively prevents a recovery in Ohio. The court in its decision specifically refuses to consider R.C. 2723.05. Therefore the court's decision that Ohio has a plain speedy and efficient procedure is clearly erroneous.

3.) In the court's haste to affirm,

it states that R.C. 5713.30 - 5713.38 afford a plain, speedy and efficient remedy. This decision runs smack in the face of its resasoning under the ditch laws. R.C. 5713.30 - 5713.38 are orders of the Department of Taxation. (See The State ex rel. Iris Sales v Voinovich et al. 43 O. App. 2d 18; 332 N.S. 2d 79.) Therefore Management & Inv. Co. v Zmut; Falor v Mong; and In re Morrison do not apply to R.C. 5713.30 - 5713.38. Clearly R.C. 2723.05 taken with R.C. 5703.38 prevent a plain, speedy and efficient system in Ohio for recovery of tax money once paid.

4.) The court stated in its Order of September 7, 1990 that only the case of Gahlon Kunkle was before it. The question of R. C. 5713.30 - 5713.38 was not involved in Mr. Kunkle's suit

against the Commissioners. The court's order deprived plaintiff Hickey the opportunity of arguing R.C. 5713.30 - 5713.38. Therefore the court's treatment of R.C. 5713.30 - 5713.38 should be removed from its decision.

Wherefore, movants pray that this court reconsider its order of January 8, 1991 and that on such reconsideration, this court vacate the order, or, in the alternative, modify the same to correct the errors pointed out above. It is requested that the court publish its decision.

This matter is of such extreme importance that the case should be restored for oral argument.

Dated January 18, 1991

William P. Hickey

William P. Hickey
1970 CR 32
Helena, Ohio 43435

CERTIFICATE OF SERVICE

Two copies have been sent to Thomas J. O'Connell, Assistant Attorney General, State Office Tower 26th Fl., 30 East Broad Street, Columbus, Ohio 43266-5414; Ronald Mayle, Sandusky County Courthouse, 100 N. Park Ave., Fremont, Ohio 43420; and Donald W. Theis, 1515 National Bank Bldg., Toledo, Ohio 43604; via the U.S. Mail, this 18th day of January, 1991.

William P. Hickey

William P. Hickey

Stamped
Filed
Feb 28, 1991
A-20 Leonard Green,
Clerk

No. 90-3261

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

GAHLON W. KUNKLE;

Plaintiff-Appellant

GAHLON KUNKLE, Mrs.; ELDIN MAAX BORTON; RANDY MERILLAT; NORTH WEST OHIO RIVERS COUNCIL

Plaintiffs

v.

FULTON COUNTY BOARD OF COMMISSIONERS; JOSEPH J. SOMMER, Director of Ohio Department of Natural Resources

Defendants - Appellees

BEFORE: KRUPANSKY, GUKY, AND SURHEINRICH, Circuit Judges.

Upon consideration of appellant's motion to reconsider or vacate the court's decision of January 8, 1991, or, in the alternative modify order; and to publish the court's decision of January 8, 1991,

It is ORDERED that the motion be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

s/s Leonard Green zi

Leonard Green, Clerk

Filed Feb. 28, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Filed
1990 Feb. 23

Gahlon W. Kunkle,
Mrs. Gahlon Kunkle,
Eldin Borton,
Randy Merillat,
North West Ohio Rivers Council,
William P. Hickey,

Plaintiffs

vs.

Case No.
3:89CV7102

Fulton County Board
of Commissioners,
Sandusky County Commissioners,
Sandusky County Auditor,
Sandusky County Treasurer,
Joseph J. Sommers,
Director of the Ohio
Department of
Natural Resources.

Defendants

OPINION
AND ORDER

POTTER, J.:

Case No. 3:89CV7102 came to this Court by the filing of a complaint wherein plaintiffs seek declaratory and equitable relief. Plaintiffs ask the Court to do the following:

1. Issue a declaratory judgment that RC Chapters 6131 through 6141 are financed by special assessments which violate the Fourteenth Amendment to the United States

Constitution, as well as for each of the other reasons given above.

2. Issue a declaratory judgment that Project 2036 is Unconstitutional in that the total costs exceed the benefits to Plaintiffs, and a large share of the people in the watershed in violation of the Fourteenth Amendment to the United States Constitution.

3. Issue a declaratory judgment that any project which is to be financed by special assessments, violates the Fourteenth Amendment to the United States Constitution:

a.) when police powers of the State are not involved, and the project to be undertaken does not have the approval of a majority of the people to be specially assessed thereunder; or

b.) when police powers of the State are involved, and the project to be undertaken does not have the approval of the majority of the people for whom the police powers are to be exercised.

4. Permanently enjoin Defendants, jointly and severally, from approving areas of, and/or promoting the draining of overflow areas of, and/or channelization of Ohio's rivers and creeks without the approval of a majority of the citizens of Ohio whose source of drinking water is affected thereby.

5. Permanently enjoin Defendants, jointly and severally from the following: approving and/or promoting ditch projects to be paid for by special assessments, and which are not required under the police powers of the State, without

first obtaining the approval of a majority of the land owners who are to be specially assessed for the project; or approving and/or promoting ditch projects which are required under the police powers of the State without first obtaining the approval of a majority of the citizens of the state of Ohio which are directly affected by the project.

6. Allow Plaintiffs their costs, herein, including reasonable attorney's fees, and such other relief as may appear to the court to be just and equitable.

(Complaint, prayer for relief.)

Although the complaint has been prepared with a broad brush, the Court concludes that the gist of the complaint is that plaintiffs have been assessed for Ditch Project 2036 in Fulton County for which they allege that they will receive no benefit, that generally proper procedures were not followed in determining the assessment, and Ohio Rev. Code 6131-6142 are unconstitutional.

Plaintiff North West Ohio Rivers Council is a nonprofit corporation

which, it is alleged, has for its purpose the conservation of rivers and streams in Northwest Ohio and elsewhere. This statement adds nothing to the case. Thereafter, William P. Hickey, who is counsel in Case No. 3:89CV7102, filed the complaint in Case No. 3:89CV7251, wherein he is the sole plaintiff against the Sandusky County Commissioners, County Auditor, County Treasurer, Joseph J. Sommers, Director of ODNR, and the Auditor of the State. Plaintiff asks that this Court do the following:

> 1. Issue a declaratory judgement that RC Chapters 6131 through 6141 are Unconstitutional in that they are financed by special assessments which violate the Fourteenth Amendment to the United States Constitution, as well as for each of the other reasons given above.
> 2. Issue a declaratory judgment that the assessment procedure used by the Sandusky County Auditor is in violation of the 14th Amendment to the U.S. Constitution; and if properly based on the rules of the Auditor of the State of Ohio, then

his rules are unconstitutional; and if his rules are properly based on Ohio RC 5713.30 through 5713.38, then these statutes are unconstitutional.

3. Hold all special assessments past and present based on Ohio RC Chapters 6131 through 6141, to be in violation of the Fourteenth Amendment to the U.S. Constitution, and as such are unconstitutional.

4. Issue a temporary restraining order pursuant to FRCP 65, ordering defendants and their officers, agents, and employees, and all those in active concort or participation with them to refrain immediately and pending the final hearing and determination of this action from foreclosing on Plaintiff's property.

5. Issue a permanent injunction perpetually enjoining and restraining defendants their officers, agents, employees, successors and attorneys and all those in active concert or participation from collecting taxes on land that is used for farm purposes on any other basis than the Current Agricultural Use Value so long as the State adopts and uses such system for taxing farm land.

6. Issue a permanent injunction perpetually enjoining and restraining defendants their officers, agents, employees, successors and attorneys, and all those in active concert or participation with them from collecting special assessments under the Ohio 'Ditch laws - Chapters 6131 through 6141 of the Ohio Revised Code.

7. Allow Plaintiff his costs,

> herein, including reasonable attorney's fees, and such other relief as may appear to the court to be just and equitable.

(Complaint, prayer for relief.)

Plaintiff in Case No. 3:89CV7251 in substance claims that he received no benefit from ditch work done in Sandusky County for which he was assessed, that Ohio Rev. Code 6131-6141 is unconstitutional, that there is a taking of private property without due process. Plaintiff also contends in Case No. 3:89CV7251 that defendants have valued his farmland in an unconstitutional manner, pursuant to Ohio Rev. Code 5713.30-5713.38. Plaintiff asks that the statutes be declared unconstitutional and that the collection of any taxes and assessments be enjoined. Case No. 3:89CV7251 was by Judge McQuade, prior to his resignation, consolidated with

3:89CV7102 and transferred to this Court.

The two causes of action have spawned innumerable motions and briefs. Fulton County officials have not proceeded with Ditch Project 2036 and there is a state court action pending wherein one of the plaintiffs in Case No. 3:89CV7102 is a plaintiff.

In Sandusky County there is an action to foreclose to collect taxes and assessments due and owing from plaintiff Hickey. The Sandusky action is proceeding, and that court has set that case for a pretrial conference. Plaintiff Hickey asked this Court on February 5, 1990 to issue a preliminary restraining order to restrain defendants Sandusky County Commissioners, Treasurer Auditor & attorneys from proceeding with the foreclosure action. The Court has conducted an oral hearing on the

motions and one for the preliminary injunctions.

County defendants inter alia would like this Court to make a substantive decision that the Ohio Statutes involved are constitutional and that no federal rights have been violated.

This Court, being one of limited jurisdiction, must first determine if in fact it may make a substantive decision. If the Court does not have jurisdiction, it may proceed no further.

The Tax Injunction Act, 28 USC 1341 is as follows: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

As set forth in 17 Wright, Miller & Cooper, Fed. Prac. & Proc. 4237:

A state remedy either in law or

> in equity will, if it is plain, speedy, and efficient, suffice to defeat jurisdiction, as will a state declaratory judgment action. The holding that only minimum procedural criteria need be met lends support to the many cases that have held that the state remedy, to satisfy this section, need not necessarily be the best remedy available or even equal to or better than the remedy that might be available in federal court.

This legislation is meant to drastically reduce federal court jurisdiction to interfere with local collection of taxes. See also Wright v. McClain, 835 F.2d 143 (6th Cir. 1987) as follows:

> The Tax Injunction Act is an expression of congressional purpose to promote comity and to afford states the broadest independence, consistent with the federal constitution, in the administration of their affairs, particularly revenue raising.

Id. at 144. See also, In re Gillis, 836 F.2d 1001 (6th Cir. 1988).

The case of California v. Grace Brethren Church, 457 U.S. 393 (1982),

is dispositive. Pertinent sections of this opinion are quoted below:

> It is plain from this language that the Tax Injunction Act prohibits a federal district court, in most circumstance, from issuing an injunction enjoining the collection of state taxes. Although this court once reserved the question, we now conclude that the Act also prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional.
>
> ...
>
> Consequently, because Congress' intent in enacting the Tax Injunction Act was to prevent federal-court interference with the assessment and collection of state taxes, we hold that the Act prohibits declaratory as well as injunctive relief. Accordingly, the District Court in these cases was without jurisdiction to declare the California tax provision unconstitutional or to issue its injunction against state authorities unless the appellees had no "plain, speedy and efficinent remedy" in the state courts.

Id. at 408-11.

Plaintiffs have contended that since they have asked that the various Ohio statutes be declared unconstitutional, 28 U.S.C.1341 is not applicable. This

contention is clearly opposed to the holding in California v. Grace Brethren Church. See also In re Gillis, 836 F.2d 1001.

Even if 28 U.S.C. 1341 was not applicable, this Court should refrain from acting on the grounds of comity. See In re Gillis, 836 F.2d at 1005 as follows:

> Although the Tax Injunction Act may not be applicable, we connot ignore the policies underlying the Act. "[E]ven where the Tax Injunction Act would not bar federal-court interference in state tax administration, principles of federal equity may nevertheless counsel the withholding of relief." Rosewell, 450 U.S. at 525 n.33, 101 S.Ct. at 1235 n. 33. Thus, even if the facts of a state tax matter do not technically fit within the language of 1341, the federal courts should restrain from interfering in the state proceedings. Alcan Aluminum v. Department of Revenue, 724 F.2d 1294 (7th Cir. 1984).

The issue then becomes whether or not the state has provided "a plain, speedy and efficient remedy." This

is the test both for the application of 28 U.S.C.1341 or restraint under the principle of comity.

Plaintiffs suggest that when 28 U.S.C.1331 was amended to remove the monetary amount necessary for this Court to have original jurisdiction over federal questions that the state courts lost concurrent jurisdiction where appropriate over federal questions. Section 1331 of 28 U.S.C. now reads as follows: "The district courts shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States."

The amendment to 28 U.S.C.1331 broadens federal court jurisdiction but it did not limit state court concurrent jurisdiction. See 13B Wright, Miller & Cooper, Fed. Prac. & Proc. 3561.1 (2d ed. 1984); cf Chivas

Products, Ltd. v. Owen, 864 F.2d 1280 (6th Cir. 1988), overruled on other grounds, 58 U.S.L.W. 4157, 4160 (1990). Plaintiffs' contention is not well taken.

Another preliminary matter is the determination of whether or not a ditch assessment is a tax under the statute. It clearly is. See 17 Wright, Miller & Cooper, Fed. Prac. & Proc. 4237 (2d ed. 1988) and cases cited therein. See also Lake Lansing Sp. A. Prot. Ass'n. v. Ingham v. Ingham Cty., etc., 488 F. Supp. 767 (W.D. Mich. S.D. 1980); Group Assisting Sewer v. City of Ansonia, 448 F. Supp. 45 (D. Conn. 1978).

Coming to the question of whether the state has provided a plain, speedy and efficient remedy, the Supreme Court in California v. Grace Brethren Church, 457 U.S. at 441 held as follows:

Last Term, in Rosewell v. La Salle National Bank, this Court had occasion to consider the meaning of the "plain, speedy and efficient" exception in the Tax Injunction Act. After reviewing previous decisions and the legislative history of the Act, the Court concluded that the "plain, speedy and efficient" exception requires the "state-court remedy [to meet] certain minimal procedural criteria." 450 U.S., at 512 (emphasis in original). In particular, a state-court remedy is "plain, speedy and efficient "only if it "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." Id., at 514 (quoting La Salle National Bank County of Cook 57 Ill. 2d318, 324, 312 N.E. 2d 252, 255-256 (1974)). Applying these considerations, the Rosewell Court held that an Illinois tax scheme, requiring the taxpayer to pay an allegedly unconstitutional tax and seek a refund through state administrative and judicial procedures, was a "plain, speedy and efficient remedy" within the meaning of the tax Injunction Act. In reaching this holding, the Court specifically relied on legislative Reports demonstrating congressional awareness that refunds were the exclusive remedy in many state tax systems.

The holding in Rosewell reflects not only Congress' express command in the Tax Injunction Act, but also the historical reluctance of the

> federal courts to interfere with the operation of state tax systems if the taxpayer had available an adequate remedy in the state courts.

The court went on to say that it must construe narrowly the "plain, speedy and efficient" exception to the Tax Injunction Act. The court noted that state court rulings might ultimately be reviewed in that court.

Turning now to the remedies provided by statute the Court quotes, with approval, the following from defendants Sommer and Limbach's motion for judgment on the pleadings:

> With respect to plaintiff's claim on the ditch assessment, Ohio Revised Code Section 6131.15 provides that the County engineer shall prepare a schedule of benefits and assessments. Section 6131.16 requires notice of a final hearing before the board of county commissioners to be given to all the owners whose names appear in the engineer's schedules of assessments and damages. Any owner may then file exceptions to the engineer's schedules with the board of county commissioners. Id 6131.17. A final hearing is held

> at which the board must hear any evidence offered for or against the asessment proposed to be levied against any owner. Id. 6131.22. Ohio Revised Code Section 6131.25 provides that any affected owner may appeal an order of the board of county commissioners to the court of common pleas. In this appeal the affected owner can raise any constitutional claims. See in re Morrison Single county Ditch No. 1330, 20 Ohio St. 3d 13 (1985).

As to Case No. 3:89CV7251 and plaintiff's challenge to the valuation and assessment of his real estate for tax purposes, plaintiff has a plain, speedy and efficient remedy under Chapters 5715 and 5717 of the Ohio Revised Code. See Iris Sales Co. v. Voinovich 43 Ohio App. 2d 18 (Ct. of App. Cuyahoga Cty. 1975), as follows:

> The existence of a special statutory procedure for the correction of any inequalities in real property taxation rates makes declaratory relief particularly inappropriate in the case at bar.
>
> Plaintiff's declaratory judgment action essentially seeks two declarations:
>
> (1) that a discriminatory classification of real property

for tax purposes has been maintained by defendants;

(2) that said discriminatory classification is illegal and unconstitutional.

If such a discriminatory classification of real estate for tax purposes is maintained by defendants, a judgment declaring this discriminatory classification illegal and unconstitutional is unnecessary. Ample statutory and case law already exists on this subject. The second and third syllabi of State, ex rel. Park Invest. Co., v. Bd. of Tax appeals (1971), 26 Ohio St. 2d 161, read as follows:

"2. The Board of Tax Appeals has the mandatory duty, in the exercise of its supervisory power and duty, pursuant to R.C.5715.01, to take such steps as are necessary to effect an orderly correction of any inequalities in the percentage of true value at which all real property and all classes thereof are assessed for taxation. (R.C. 5715.011, effective May 14, 1969.)

"3. Action taken pursuant to the mandatory provisions of R.C. 5715.01 and 5715.011 must carry out the constitutional command, set forth in Section 2 of Article XII of the Ohio Constitution, that 'land and improvements thereon shall be taxed by uniform rule according to value,' and the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

Id. at 20-21.

It may be that some of the remedies outlined above may no longer be available to plaintiffs. However, a plaintiff cannot finesse or forward fumble his way into federal court. See 17 Wright, Miller & Cooper, Fed. Prac. & Proc. 4237 (2d ed. 1988):

> If the state has made available a suitable remedy, that defeats federal jurisdiction even though the taxpayer has failed to take advantage of it and it is too late now to do so. A state remedy will bar relief even though the highest state court has previously rejected the constitutional challenge the taxpayer wishes to raise. All grounds must be raised in the state action. A plaintiff cannot reserve for decision by a federal court the federal grounds for the challenge.

The court finds that it does not have jurisdiction over the causes of action set forth in either complaint, and the complaints must be dismissed. See Fed. R.. Civ. P. 12(b)(1). Since the various motions including the motions for preliminary injunction

are appendages to the complaints, they fall with the complaints and require no ruling by this Court except for defendant Fulton County's motion for sanctions. The Court finds that plaintiffs have not violated Fed. R. Civ. P. 11.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED this case be, and hereby is, DISMISSED; and it is

FURTHER ORDERED that defendant Fulton County's motion for sanctions be, and hereby is, DENIED.

Sgn John W. Potter

United States District Judge

Filed
A-41
1990 Mar 7
Clerk

UNITED STATES DISTRICT COURT

Northern DISTRICT OF

Ohio, Western Division

Gahlon W. Kunkle, et al.

v. JUDGMENT IN A

CIVIL CASE

Fulton County Board of

Commissioners et al.

CASE NUMBER

C 89-7102

IT IS ORDERED AND ADJUDGED that this case is dismissed; defendant Fulton County's motion for sanctions is denied.

John W. Potter
Judge

March 7, 1990 James S. Gallas
Clerk

sgn Barbara J. Pompos
Deputy Clerk